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COMMISSION ON JUDICIAL PERFORMANCE
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**REPORT CONCERNING ADOPTION ON MAY 23, 2007
OF ADDITIONS AND AMENDMENTS TO RULES OF THE
COMMISSION ON JUDICIAL PERFORMANCE**

Pursuant to its rule-making authority under article VI, section 18, subdivision (i) of the California Constitution, on February 27, 2007, the Commission on Judicial Performance circulated for public comment a set of eight proposals for additions and changes to certain of its rules. Following consideration of the comments received, the commission adopted seven of the proposals to its rules at its meeting on May 23, 2007, as summarized below. The text of each addition and amendment is attached and the final version of the amended rules may be found on the commission's Web site, www.cjp.ca.gov.

The commission voted to re-circulate for public comment proposed new rule 122(g) (expansion of depositions during formal proceedings) in light of changes that have been proposed subsequent to February 27, 2007. A proposed amendment to rule 118(c) (service of notice of formal proceedings), which was adopted on an interim basis, is also being circulated for public comment.

I. EXPLANATION OF ADDITIONS AND AMENDMENTS

A. Amendment to Rule 102(k) – Provides for Disclosure of Information to Regulatory Agencies When Subordinate Judicial Officer Is Terminated by Superior Court (see page 5)

Existing rule 102(k) authorizes the commission to release information regarding a preliminary investigation or other commission proceeding to the State Bar or other regulatory agencies when a judge or subordinate judicial officer retires or resigns from office. The amendment permits the commission to disclose the same information when a subordinate judicial officer is terminated from employment by the superior court. The revision was adopted to promote uniformity in the rules relating to judges and subordinate judicial officers who leave office while the subject of a commission investigation or proceeding or before a complaint is filed with the commission.

No comments were received.

B. Amendment to Rule 126(d) – Authorizes Commission to Petition a Court for Appointment of Conservator During Formal Proceedings (see pages 5-6)

Previously, rule 126(d) authorized the commission to appoint a conservator during formal proceedings if the judge was adjudged insane or incompetent, or if it appeared to the commission at any time that the judge was not competent to act for himself or herself. The amended rule deletes language authorizing the commission to appoint a conservator and, instead, authorizes the commission to petition a court to do so in accordance with Probate Code section 1820, subdivision (a)(4), which permits interested state agencies to file a petition for the appointment of a conservator for a person. Probate Code section 1801 authorizes a court to appoint a conservator for a person who is unable to manage his or her personal needs or who is “substantially unable to manage his or her own financial resources or resist fraud or undue influence” (Prob. Code § 1801, subs. (a) & (b).)

No comments were received.

C. Amendments to Rules 113 and 115 – Provides for Citing of Prior Discipline in Notices of Private and Public Admonishment (see page 6)

Existing rules 113 and 115 provide, respectively, for the issuance of a notice of intended private admonishment and a notice of intended public admonishment. The rules provide that the notice shall include a statement of facts found by the commission, the reason for the proposed admonishment, and an advisement of the judge’s options under rule 114 or 116. The amendment adds that the notice may also cite any discipline that was imposed on the judge prior to the issuance of the notice.

Existing rule 125(b) permits the admission in formal proceedings of any prior disciplinary action “to prove that conduct is persistent or habitual or to determine what action should be taken regarding discipline.” Once the private discipline is admitted into evidence at a public formal proceeding it becomes part of a public record and can be cited in the report of the masters and the commission’s decision. (Rules 129 & 135.) Prior discipline, including private discipline, historically has been a significant factor in determining the appropriate level of discipline in commission proceedings. (See, e.g., *Doan v. Commission on Judicial Performance* (1995) 11 Cal.4th 294, 339-340; *Inquiry Concerning Judge D. Ronald Hyde*, No. 166, Decision and Order Removing Judge Hyde from Office (2003), pp. 27-28; *In re Maciel*, Pub. Admon. (2006).)

Because the rules for private and public admonishment (rules 113 and 115) permit a judge to accept or contest an admonishment without going to formal proceedings (unless the judge so elects), the commission has historically cited applicable prior discipline in the notice of intended private or public admonishment. The amendments to rules 113 and 115 were adopted to codify this practice. If a judge wishes to challenge the inclusion of prior discipline, the judge may do so in written objections to the intended admonishment filed in conjunction with a demand for an appearance before the commission (rules 114(b) and 116(b)), or the judge may elect to demand formal proceedings (rules 114(c) and 116(c)).

No comments were received.

D. New Rule 116.5 – Authorizes Negotiated Settlement During Preliminary Investigation (see page 6)

Existing rule 127 authorizes trial counsel and the judge to enter into negotiations on a stipulated discipline *after the initiation of formal charges* and before final disposition. New rule 116.5 permits commission legal staff to enter into negotiations with the judge at the preliminary investigation stage of the proceedings. The rule requires that any negotiated settlement be approved by the commission. It also provides that the settlement cannot be used against the judge in later proceedings if the proposal is rejected by the commission. It is contemplated that the new rule will benefit the judge and the public by hastening resolution of appropriate cases.

No comments were received.

E. Amendment to Rule 108(c) – Extension of Time for Commencing Hearing Before Special Masters Disfavored and Must Be Supported by Declaration of Facts Showing Good Cause (see page 7)

Rule 108(c) was amended to express the commission's long-standing policy that extensions of time for commencing a hearing before the special masters are disfavored. In accordance with this policy, the amendment requires such requests to be supported by a declaration detailing the specific facts showing why a continuance is necessary and also states that good cause for a continuance of a hearing before the special masters does not include the ordinary press of business.

The amendments to the rule are intended to protect the public's interest in prompt resolution of commission matters that have been set for formal proceedings. Continuance of a matter that has already been scheduled for a hearing before the special masters often causes inconvenience and hardship to witnesses, the special masters, parties, and court personnel at the venue chosen for the hearing. Selecting new dates requires finding an available venue and also accommodating the schedules of the special masters, the judge and counsel. This may necessitate the appointment of new special masters or result in undue delay. Policy Declaration 3.12, "Extensions of Time," states that extensions of time in commission proceedings are disfavored. The amendment to rule 108(c) provides explicit notice of the application of this commission policy to extensions of time in formal proceedings.

The amendment also provides notice of the requirement that an extension of time for commencing a hearing before the special masters be supported by a declaration detailing specific facts showing good cause for a continuance. This provision is consistent with the requirements for continuances of civil and criminal trials. (Pen. Code § 1050(b); Cal. Rules of Court, rule 3.1332(b).)

No comments were received.

F. New Rule 134.5 – Otherwise Disqualified Commission Members to Participate when Necessary to Convene Quorum (Rule of Necessity)
(see page 7)

New rule 134.5 is a codification of the well-established “rule of necessity.” Developed under common law, the “rule of necessity” allows public officials to take actions they would otherwise be disqualified from taking by operation of conflict of interest rules if their disqualification would make it impossible for the public agency to fulfill one of its vital public duties. The rule was developed “to prevent the vital processes of government from being halted or impeded by officials who have conflicts of interests in the matters before them.” (*Kunec v. Brea Redevelopment Agency* (1997) 55 Cal.App.4th 511, 520; *Olsen v. Cory* (1980) 27 Cal.3d 532; *Aluisi v. Fresno County* (1960) 178 Cal.App.2d 443.)

Rule 134.5 provides that a commission member with an actual or potential conflict is not disqualified from participating in the proceedings when the commission would not otherwise have a quorum. The basis of the commission member’s conflict and the reason the member’s participation was necessary must be recorded in the minutes and included in any resulting discipline. Although the practice is authorized by case law, the new rule was adopted to inform the public and the judiciary that it could be followed in commission proceedings when necessary.

No comments were received.

G. Amendment to Rule 119.5 and New Rule 125.5 – In Formal Proceedings, All Original Documents Are to Be Filed at Commission Office, Except for Original Hearing Exhibits Which Are to Be Filed with Presiding Special Master (see pages 7-8)

Prior to the amendment, rule 119.5 required that the originals of all documents related to a hearing before the special masters be filed with the presiding master. The amendment to rule 119.5 provides for the filing of all briefs and other papers at the commission office, with copies served on the masters and the other party or parties. The only exception to this rule is for original exhibits admitted at the hearing. New rule 125.5 provides for the filing of original exhibits with the special masters. Pursuant to the new rule, the original exhibits are to be transmitted to the commission office at the completion of the hearing or before the submission of the masters’ report.

Under prior rule 119.5, the presiding master was responsible for filing and maintaining documents submitted in conjunction with the hearing. At times, this was burdensome and inefficacious. The amendment and new rule are designed to assure that the originals of briefs and other papers, other than hearing exhibits, submitted in conjunction with formal proceedings are filed and maintained in the commission office to prevent loss or damage, and to facilitate inspection of public documents at the commission office.

One comment was received from the Honorable Eugene Premo, Associate Justice, Court of Appeal, Sixth Appellate District, who served as a special master. Justice Premo recommends against imposing on the masters more than the minimal administrative duties because in most

instances the special masters do not have clerical assistance during the proceedings. The rule revision is designed, in part, to alleviate some of the administrative burden that was previously imposed on special masters. Previously, the presiding special master was responsible for filing and maintaining originals of *all* documents related to a hearing before the special masters, including briefs. Under the revision and new rule, special masters would only be responsible for filing and maintaining original evidentiary exhibits. Having original evidentiary exhibits filed at the commission office is not feasible because the documents are filed when admitted at the hearing and witnesses may need to examine original exhibits during their testimony.

II. TEXT OF RULES SHOWING ADDITIONS AND AMENDMENTS

Rule 102. Confidentiality and Disclosure

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(k) (Disclosure of information to regulatory agencies upon retirement or resignation) If a judge retires or resigns from office or if a subordinate judicial officer retires, ~~or resigns~~ or is terminated from employment after a complaint is filed with the commission, or if a complaint is filed with the commission after the retirement, ~~or resignation~~ or termination, the commission may, in the interest of justice or to maintain public confidence in the administration of justice, release information concerning the complaint, investigation and proceedings to the State Bar or to other regulatory agencies, provided that the commission has commenced a preliminary investigation or other proceeding and the judge or subordinate judicial officer has had an opportunity to respond to the commission's inquiry or preliminary investigation letter.

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Rule 126. Procedural Rights of Judge in Formal Proceedings

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(d) (Appointment of conservator) If the judge is adjudged insane or incompetent, or if it appears to the commission at any time during the proceedings that the judge is not competent to act for himself or herself, the commission ~~shall appoint a conservator~~ may petition a court of competent jurisdiction for the appointment of a conservator unless the judge has a conservator who will represent the judge. ~~In the appointment of such conservator, preference shall be given, whenever possible, to members of the judge's immediate family.~~ If a conservator is or has been appointed for a judge, ~~t~~The conservator may claim and exercise any right and privilege and make any defense for the judge with the same force and effect as if claimed, exercised, or made by the judge, if competent, and whenever these rules provide for serving, ~~or giving~~ notice or sending any matter to the judge, such notice or matter shall be served, given, or sent to the conservator.

Rule 113. Notice of Intended Private Admonishment

If after a preliminary investigation the commission determines that there is good cause for a private admonishment, the commission may issue a notice of intended private admonishment to the judge by certified mail. The notice shall include a statement of facts found by the commission and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 114. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

Rule 115. Notice of Intended Public Admonishment

If the commission determines following a preliminary investigation that there is good cause for public discipline, the commission may issue a notice of intended public admonishment to the judge by certified mail. The notice shall include a statement of facts found by the commission and the reasons for the proposed admonishment. The notice shall also contain an advisement as to the judge's options under rule 116. The notice may cite any discipline that was imposed on the judge prior to issuance of the notice.

Rule 116.5. Negotiated Settlement During Preliminary Investigation

At any time during a preliminary investigation or an admonishment proceeding under rules 113-116, the commission may designate trial counsel or another attorney authorized by the commission to negotiate with the judge a resolution of any matter at issue. A proposed resolution shall be jointly submitted to the commission, which may accept it, reject it or return it to the judge and examiner to consider modifications to it. No agreement between the judge and legal staff is binding unless approved by the commission. A settlement proposal rejected by the commission cannot be used against the judge in any proceedings. After formal proceedings are instituted, settlement negotiations are governed by rule 127.

Rule 108. Extensions of Time

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(c) (Extension of time for commencing hearing before the special masters ~~to obtain reasonable discovery or for other reasons~~) In order to maintain public confidence in the integrity of the judiciary and protect the welfare of the public, all hearings before the special masters shall be heard at the earliest possible time after the issuance under rule 118 of the notice of formal proceedings. In accordance with this policy, extensions of time for commencing a hearing before the special masters are disfavored. The chairperson of the commission or the presiding master may extend the time for commencing a hearing before the special masters upon a showing of good

cause to permit either party to obtain reasonable discovery as provided in these rules, or for other reasons set forth in a showing of good cause, supported by declaration detailing specific facts showing that a continuance is necessary. Good cause does not include the ordinary press of business.

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Rule 134.5. Rule of Necessity

A commission member shall not be subject to disqualification based on an actual or potential conflict of interest if his or her disqualification would prevent the existence of a quorum. This rule does not apply if a quorum can be convened with members who are not actually present. The basis of the commission member's actual or potential conflict and the reason the member's participation was necessary shall be recorded in the minutes and included in any resulting discipline.

Rule 119.5. Filing with the Commission During Formal Proceedings

After institution of formal proceedings, all briefs and other documents papers required to be filed with the commission shall be delivered to commission staff at the commission office during regular business hours and shall be accompanied by a proof of service of the document upon the other party or parties, and upon the special masters if they have been appointed in the matter. This includes documents submitted in conjunction with a hearing before the special masters, other than exhibits to be admitted at the hearing. Exhibits admitted at a hearing before the masters shall be transmitted to the commission office pursuant to rule 125.5. A document is filed with the commission when the original is stamped or otherwise marked "filed" with the date. The commission's agent for purposes of filing documents after institution of formal proceedings is the Legal Advisor to Commissioners or the Legal Advisor's designee. A filing may be evidenced by a conformed copy of the cover page of each document submitted for filing.

Unless otherwise specified, documents submitted in conjunction with a hearing before special masters shall be delivered to the presiding master accompanied by a proof of service on the other masters and the other party or parties, or as otherwise requested by the masters; a copy shall be lodged with the Legal Advisor pending return of the record at the conclusion of the hearing.

Rule 125.5 Exhibits at Hearing

Original exhibits admitted at a hearing before the special masters shall be transmitted by the masters to the commission office at the completion of the evidentiary portion of the

hearing, unless the masters determine that there is reason to retain the original exhibit or exhibits to assist in the preparation of their report to the commission. Any original exhibits retained by the masters shall be transmitted to the commission at or before the time the report of the masters is submitted to the commission.

III. PROPOSED RULES AND AMENDMENTS CONSIDERED BY THE COMMISSION BUT NOT ADOPTED

A. Consideration of Judge Relying on Ethics Advice

Alameda County Superior Court Judge Alice Vilardi proposed the commission adopt the following rule: “The commission may consider the fact that a judge requested and relied on ethics advice concerning the act or omission alleged to constitute misconduct in determining whether misconduct occurred and, if so, the appropriate action to be taken in regard to the misconduct.”

The commission considered the proposed rule, but voted against its adoption. Historically, in appropriate cases, the commission has taken the fact that a judge relied on ethics advice from the California Judges Association (CJA) or other sources into account in determining whether conduct was intentional, whether discipline is warranted, and, if so, at what level. Presently, no official body is charged with the authority of rendering ethics advice to judges. Accordingly, the commission determined that it would not be appropriate to adopt a rule which could be interpreted to imply that the commission has an obligation to give deference to the unofficial opinions of any body or individual.

B. Discovery Prior to Notice of Formal Proceedings

CJA proposed an amendment to rule 122(c) which would require the commission to provide discovery of exonerating evidence to a subject judge prior to the commencement of formal proceedings. Under existing rule 122(c), *at the time of service of the notice of formal proceedings*, the subject judge must be provided copies of all non-privileged information specified in rule 122(e) which is in the possession of the commission. The information required to be provided includes non-privileged exonerating evidence.

The Supreme Court has held that no due process rights attach during the judicial disciplinary proceedings prior to the filing of charges. Specifically, the Supreme Court held that the commission has an obligation to maintain confidentiality of information acquired during the investigatory stage of the proceedings. (*Ryan v. Commission on Judicial Performance* (1988) 45 Cal.3d 518, 527-529 [addressing a judge’s rights during the investigation phase of commission proceedings].) “Such confidentiality protects a judge from premature public attention and also protects the witnesses from intimidation.” (*Id.* at pp. 527-528.)

The commission voted against adopting the proposed rule to maintain confidentiality and to assure the accuracy and integrity of its investigation. As the Supreme Court recognized, “[d]uring this investigatory period the commission must have the freedom to collect accurate and untainted information.” (*Ryan, supra*, 45 Cal.3d. at p. 528.)